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Harianto Effendy bin Zakaria & Ors v Mahkamah Perusahaan Malaysia & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-6–03 OF 2012(W)
AHMAD MAAROP, HASAN LAH, ZALEHA ZAHARI, JEFFREY TAN AND RAMLY ALI FCJJ
20 OCTOBER 2014

Labour Law — Employment — Dismissal — Picketing — Employees who picketed within bank's premises dismissed — Whether punishment of dismissal harsh and disproportionate — Whether employees' failure to apologise to employer and show remorse material fact to be taken into account in deciding whether dismissal reasonable punishment — Whether employees merely denied charges and maintained picketing was lawful — Whether fact employees were long standing workers with unblemished disciplinary record did not mean they could not be dismissed for single act of insolence — Whether employees' actions showed wilful disobedience and brought disrepute to bank

The second respondent ('the bank') dismissed the appellants from employment for taking part in an illegal picket within the bank's premises during banking hours. The dismissal followed a domestic inquiry ('DI') convened by the bank which found the appellants guilty and ruled that their misconduct had disrupted the bank's operations and caused disrepute to its image. At the DI, the appellants' common defence was a denial of the charge. When they were asked to submit their plea in mitigation after being found guilty, the appellants individually replied in a standard form letter requesting the bank to consider all the circumstances of the case in the light of the contents of a letter (which they enclosed) that the office of the Prime Minister/Minister of Finance had written to the chairman of the bank. The first respondent ('the Industrial Court') upheld the dismissal of the appellants holding that a deterrent sentence was necessary as the appellants' actions tended to adversely affect the bank's good name and its relationship with customers. The High Court dismissed the appellants' application to quash the Industrial Court's award holding that the latter had not committed any error of law in coming to its decision. A further appeal by the appellants to the Court of Appeal ('the COA') was unanimously dismissed. The COA held the appellants' contention that they were not victimised by the bank for being active union members and their dismissal was neither harsh nor actuated by discriminative practice. In the instant appeal against the COA's decision, the appellants submitted that in upholding their dismissal, the courts below erred in not taking into account the fact that (a) the appellants were long-standing employees of the bank without previous record of disciplinary problems (b) the bank had practised double standards in that

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five other employees who, based on the bank's CCTV recording, had participated in the picket along with the appellants were either found not guilty or were issued with a caution letter or punished with a two-year freeze in salary increment. The bank contended, inter alia, that the dismissal of the appellants was justified because they did not show any remorse for their actions.

Held, dismissing the appeal:

(1) The dismissal of the appellants was fair and was proportionate to the misconduct committed by them. There was no merit in the contention that the dismissal was actuated by discriminative practice. The allegation of inconsistency of punishment of the five employees who were charged together with the appellants was misconceived. Three of the five employees were found not guilty by the domestic inquiry. The fourth person ('Maimunah') was found guilty but on considering her plea of mitigation the bank lifted her suspension and imposed a stoppage of increment for two years. As for the last person ('Rohana'), the bank after taking into account her written explanation lifted her suspension and issued her with a caution letter. Unlike Maimunah and Rohana, the appellants did not apologise to the bank for their actions even though they were given the opportunity to do so. They showed no remorse. The conduct of the appellants after the offence was established must be taken into account in deciding whether or not it was reasonable to dismiss them (see paras 40, 42 & 46).

(2) The appellants' common defence to the charge was a denial of the allegations. In the letter signed by the General Secretary of the National Union of Bank Employees, they contended that the picket was in compliance with the proviso to s 40(1) of the Industrial Relations Act 1967. When the appellants were asked to submit their plea of mitigation they responded vide standard letters (asking the bank to consider the circumstances of the case in the light of the contents of a letter the office of the Prime Minister/Minister of Finance had written to the chairman of the bank) (see para 41).

(3) Although the fact the appellants were long standing employees of the bank with no past record of disciplinary problems was a matter that should be taken into consideration in deciding whether or not it was reasonable to dismiss them, there was no fixed rule of law to suggest that it was unreasonable to dismiss employees with unblemished records for a single instance of insolence. It depended on the nature of the misconduct (see para 43).

(4) The appellants' participation in an unlawful picket in the lobby and banking hall of the bank was an act of wilful disobedience that brought the bank into disrepute among its customers and other employees. The Industrial Court did consider the misconduct and the fact the banking

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industry belonged to a special kind of business rendering services to the public and that a high standard of care and conduct was expected of an employee in the banking industry (see para 44).

(5) The charge against the appellants was a very grave misconduct that involved the core of the bank's business and the appellants must have been aware that dismissal would have been the inevitable punishment for their actions (see para 45).

[Bahasa Malaysia summary

Responden kedua ('bank') telah memecat perayu-perayu daripada pekerjaan kerana mengambil bahagian dalam piket haram di dalam premis bank semasa waktu perbankan. Pemecatan itu diikuti dengan siasatan dalaman ('SD') yang diadakan oleh bank yang mendapati perayu-perayu bersalah dan memutuskan bahawa salah laku mereka telah menjejaskan operasi bank dan menyebabkan imejnya terjejas. Semasa SD, pembelaan bersama perayu-perayu adalah penafian terhadap pertuduhan. Apabila mereka diminta untuk mengemukakan rayuan dalam mitigasi selepas didapati bersalah, perayu-perayu secara individu menjawab dalam surat rasmi yang standard meminta bank mempertimbangkan semua keadaan kes tersebut berdasarkan kandungan surat (yang dilampirkan oleh mereka) bahawa Pejabat Perdana Menteri/Menteri Kewangan telah menulis kepada pengerusi bank tersebut. Responden pertama ('Mahkamah Perusahaan') mengekalkan pemecatan perayu-perayu dengan memutuskan bahawa hukuman pencegahan adalah perlu kerana tindakan perayu-perayu yang cenderung untuk menjejaskan nama baik bank dan hubungannya dengan pelanggan. Mahkamah Tinggi menolak permohonan perayu-perayu untuk membatalkan award Mahkamah Perusahaan dengan memutuskan bahawa Mahkamah Perusahaan tidak melakukan apa-apa kesilapan undang-undang dalam membuat keputusannya. Rayuan selanjutnya oleh perayu-perayu kepada Mahkamah Rayuan ('MR') telah ditolak secara sebulat suara. MR telah memutuskan hujah perayu-perayu bahawa mereka tidak terjejas oleh bank tersebut kerana menjadi ahli-ahli kesatuan yang aktif dan pemecatan mereka tidak keras atau didorong oleh amalan diskriminasi. Dalam rayuan ini terhadap keputusan MR, perayu-perayu berhujah bahawa dalam mempertahankan pemecatan mereka, mahkamah bawahan terkhilaf dalam mengambil kira fakta bahawa: (a) perayu-perayu merupakan pekerja-pekerja yang telah berkhidmat lama dengan bank itu tanpa sebarang rekod berhubung masalah tatatertib; (b) bank itu telah mengamalkan pilih kasih di mana lima pekerja lain yang, berdasarkan rakaman CCT bank tersebut, telah menyertai dalam piket tersebut bersama perayu-perayu tidak didapati bersalah atau diberi surat amaran atau dihukum dengan pembekuan kenaikan gaji selama dua tahun. Bank itu berhujah, antara lain, bahawa pemecatan perayu-perayu adalah wajar kerana mereka tidak menunjukkan apa-apa rasa bersalah untuk tindakan mereka.

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Diputuskan, menolak rayuan:

(1) Pemecatan perayu-perayu adalah adil dan sesuai dengan salah laku yang dilakukan oleh mereka. Tiada merit dalam hujah bahawa pemecatan itu didorong oleh amalan diskriminasi. Dakwaan berhubung hukuman yang tidak konsisten lima pekerja yang dituduh bersama perayu telah disalah tanggap. Tiga daripada lima pekerja itu telah didapati bersalah oleh siasatan dalaman. Orang keempat ('Maimunah') didapati bersalah tetapi setelah mengambil kira rayuan mitigasinya bank itu telah menarik balik penggantungannya dan mengenakan pembekuan kenaikan gaji selama dua tahun. Berhubung orang terakhir ('Rohana'), bank itu setelah mengambil kira penjelasan bertulisnya telah menarik balik penggantungannya dan memberinya surat amaran. Tidak seperti Maimunah dan Rohana, perayu-perayu tidak memohon maaf kepada bank itu kerana tindakan mereka meskipun mereka telah diberikan peluang berbuat demikian. Mereka tidak menunjukkan rasa kesal. Perbuatan perayu-perayu selepas kesalahan dibuktikan hendaklah diambil kira dalam membuat keputusan sama ada atau tidak ia adalah munasabah untuk memecat mereka (lihat perenggan 40, 42 & 46).

(2) Pembelaan bersama perayu-perayu terhadap penafian berhubung dakwaan itu. Dalam surat yang ditandatangani oleh Setiausaha Agung Kesatuan Kebangsaan Pekerja-pekerja Bank, mereka berhujah bahawa piket itu telah mematuhi proviso s 40(1) Akta Perhubungan Perusahaan 1967. Apabila perayu-perayu diminta untuk mengemukakan rayuan mitigasi mereka mereka telah memberi maklum balas melalui surat-surat standard (meminta bank itu mempertimbangkan keadaan kes berdasarkan kandungan surat Pejabat Perdana Menteri/Menteri Kewangan yang telah ditulis kepada pengerusi bank itu) (lihat perenggan 41).

(3) Walaupun pada hakikatnya perayu-perayu merupakan pekerja-pekerja yang telah lama berkhidmat dengan bank itu tanpa sejarah rekod berhubung masalah tatatertib adalah perkara yang patut diambil kira dalam memutuskan sama ada atau tidak ia munasabah untuk memecat mereka, tiada rukun undang-undang yang tetap untuk mencadangkan bahawa ia adalah tidak munasabah untuk memecat pekerja-pekerja yang mempunyai rekod bersih hanya kerana satu kejadian kurang ajar. Ia bergantung kepada sifat salah laku itu (lihat perenggan 43).

(4) Penglibatan perayu-perayu dalam piket haram di lobi dan dewan perbankan di bank itu adalah tindakan ketidakpatuhan yang disengajakan yang menyebabkan reputasi bank itu terjejas di kalangan pelanggannya dan pekerjanya yang lain. Mahkamah Perusahaan telah mempertimbang salah laku itu dan fakta yang industri perbankan mempunyai jenis perniagaan khusus yang memberikan perkhidmatan kepada orang awam dan piawaian penjagaan yang tinggi dan kelakuan

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yang diharapkan daripada pekerja dalam industri perbankan (lihat perenggan 44).

(5) Pertuduhan terhadap perayu-perayu adalah salah laku yang sangat serius yang melibatkan teras perniagaan bank itu dan perayu-perayu pasti mengetahui bahawa pemecatan itu adalah hukuman yang tidak dapat dielakkan kerana tindakan-tindakan mereka (lihat perenggan 45).]

Notes

For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1078–1149.

Cases referred to

Perwira Habib Bank (M) Bhd v Tan Teng Seng @ Lim Teng Ho [1997] 2 ILR 839, IC (refd)

Abdul Wahab Hj Suboh v CIMB Bank Berhad [2012] 4 ILR 445, IC (refd)

Azizan Abd Ghani v Bumiputra-Commerce Bank Berhad [2012] 3 ILR 436, IC (refd)

British Leyland (UK) Ltd v Swift [1981] IRLR 91, CA (refd)

Chartered Bank v National Union of Bank Employees [1983] 2 ILR 111, IC (refd)

HongKong Bank Malaysia Berhad v Jaafar Ahmad Thani [2007] 4 ILR 601, IC (refd)

Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 2 All ER 285, CA (refd)

Milan Auto Sdn Bhd v Wong Seh Yen [1995] 3 MLJ 537, FC (refd)

Norizan bin Bakar v Panzana Enterprise Sdn Bhd [2013] 6 MLJ 605; [2013] 9 CLJ 409, FC (refd)

Sunmugam a/l Subramaniam v JG Containers (M) Sdn Bhd & Anor [1998] MLJU 656; [2000] 6 CLJ 521, HC (refd)

Yahaya Talib v Southern Bank Berhad & Anor [2009] 1 LNS 1785, HC (refd)

Legislation referred to

Industrial Relations Act 1967 ss 20, 20(3), 30(5), 40(1), 49(1)(i), (ii), Second Schedule, Item 5

Appeal from: Civil Appeal No W-01–735 of 2010 (Court of Appeal, Putrajaya)

Ambiga Sreenevasan (Alex De Silva, Anand Ponnudurai, Kamini Visvanathan with her) (Bodipalar Ponnudurai De Silva) for the appellants.

T Thanalingam (Shaik Azrin Shaik Daud, Lisa Tan Yu Wai, Fara Nadia bt Hashim with him) (Lee Hishammuddin Allen & Gledhill) for the second respondent.

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Hasan Lah FCJ (delivering judgment of the court):

[1] This court had, on 7 March 2012, granted leave to the appellants to appeal on the following question of law:

> Whether by virtue of section 20(1) of the Industrial Relations Act 1967 the Industrial Court, in determining whether the dismissal of an employee was with just cause or excuse, is required to consider whether the punishment of dismissal was warranted in and proportionate to the findings of misconduct by the employer?

[2] The background facts are as follows. All of the appellants were confirmed employees of the second respondent prior to their dismissal on 27 April 2004. At all material times, the appellants were active members of the National Union of Bank Employees ('the NUBE').

[3] In October 2003, NUBE and some of its members commenced lawful trade union picketing pursuant to s 49(1)(i) and (ii) of the Industrial Relations Act 1967 in relation to a trade dispute between NUBE and the second respondent in connection with NUBE's dissatisfaction over several work related matters and certain terms and conditions of employment.

[4] The said picketing outside the second respondent's premises at Bangunan BCB No 6, Jalan Tun Perak, Kuala Lumpur ('BCB Building') commenced on 9 October 2003 and continued on 13–14 October 2003 and 20–21 October 2003.

[5] On 21 October 2003, the appellants were outside of BCB Building at about 12.30pm to commence picketing. The picket ended at approximately 1.30pm.

[6] The appellants claimed that when the NUBE members and the appellants were approaching the side entrance of BCB Building to return to their respective work stations after the picketing the second respondent's security officers, who were on duty, blocked the said entrance by forming a barricade to prevent the NUBE members and the appellants from returning to their respective work stations.

[7] As a result of the lock out, the NUBE officials made sure that their members, including the appellants, were permitted to return to their work stations without any further intimidation/harassment by the second respondent's security officers. The appellants denied that they participated in any picket within the premises of the second respondent.

[8] The second respondent on the other hand, claimed that at or about

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1.25pm on 21 October 2003 the picketers moved from the front of the BCB Building and proceeded towards the side entrance of BCB Building holding placards and balloons. They thereafter barged through the side entrance despite attempts by security personnel to prevent them from doing so.

[9] The second respondent also claimed that this group of picketers thereafter proceeded to the lobby and entered the banking hall. After a couple of minutes, they left the premises and dispersed. Their conduct was captured on the second respondent's security closed circuit television.

[10] The second respondent claimed that the appellants, as employees, had conducted themselves in a manner that had disrupted the second respondent's business and operations. Their conduct also caused disrepute to the second respondent's image as a premier financial institution in the country.

[11] The second respondent then issued letters of suspension to 15 employees, including the appellants from duty pending further investigations into their conduct on 21 October 2003. The 15 employees, including the appellants, were then issued with show cause letters as to why disciplinary action should not be taken against them for participating in an unlawful picket on 21 October 2003.

[12] The reply to these letters was from NUBE for all of the appellants. Vide letters dated 2 December 2003, the second respondent requested the relevant employees to submit individual letters of explanation to the show cause letter that had been issued to them. The respective employees, including the appellants, replied vide letters dated 4 and 8 December 2003 denying the allegations made against them.

[13] Vide letters dated 24 December 2003, the second respondent issued to the appellants notices to attend a domestic inquiry. The letters were issued after carrying out a thorough investigation into the matter and after all consideration of the explanation provided by the appellants in response to the show cause letters that had been issued to them. The charge that was leveled against the appellants was as follows:

> On 21 October 2003 there was a picket outside Bangunan BCB, Jalan Tun Perak. It is alleged that you had, as an employee of the Bank on 21 October 2003 between 1.29pm and 1.34pm entered into the premises of Bangunan BCB Jalan Tun Perak and participated in an unlawful picket within the premises. You had further conducted yourself in a manner that has led to the disruption of the Bank's business and operations and the same has caused disrepute to the Bank's image.

[14] The domestic inquiry was duly convened against all the appellants. At the said inquiry the appellants pleaded not guilty to the charge leveled against

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them. The appellants provided a common defence to the allegations. They basically denied the allegations.

[15] Vide letters dated 12 April 2004, the appellants were notified that they were found guilty as charged. The second respondent, before imposing any punishment, requested the appellants to submit in writing their plea in mitigation. The appellants replied in a standard form vide letters dated 19 April 2004.

[16] The second respondent then reinstated five of the 15 employees ie Maimunah bt Mat Nor, Zamir bin Ahmad, Noor Jam bin Kader Mohiden, Ahmad bin Kassim and Rohana bt Abdul Samad.

[17] As for the appellants, vide letter dated 27 April 2004 their services were terminated with effect from same date.

AWARD OF THE INDUSTRIAL COURT (THE FIRST RESPONDENT)

[18] The first respondent, in its Award No 1266 of 2009 dated 27 October 2009 ('award') and after 12 days of hearing upheld the dismissal of all the appellants. The first respondent concluded that the appellants' dismissal was with just cause or excuse. In upholding the second respondent's decision the first respondent held that although the misconduct was a minor misconduct, a deterrent sentence was necessary as it affected the second respondent's goodwill. The first respondent said:

> Isu seterusnya ialah sama ada tindakan membuang YM-YM melainkan YM4 adalah berpatutan jika dilihat kepada tempoh masa YM-YM bekerja dengan responden dan dibandingkan dengan kesalahan yang dilakukan. Walaupun kesalahan tersebut boleh dianggap kecil tetapi jika dilihat kepada industry perbankan terutamanya yang melibatkan urusan pelanggan dan melibatkan nama baik syarikat maka kesalahan yang dilakukan oleh YM-YM melainkan YM4 adalah serius dan hukuman yang dikenakan perlulah berbentuk deteren. Oleh yang demikian, Mahkamah selanjutnya berpendapat tindakan membuang kerja YM-YM melainkan YM4 adalah berpatutan. Konklusinya Mahkamah mendapati pembuangan kerja YM-YM melainkan YM4 dibuat dengan alasan atau sebab yang adil. Oleh itu, permohonan YM-YM melainkan YM4 dengan ini ditolak. Manakala permohonan YM4 diterima.

DECISION OF THE HIGH COURT

[19] The appellants filed an application for judicial review to quash the award of the first respondent. The appellants contended that the Industrial Court had arrived at a totally perverse decision which was devoid of justification which no reasonable body or persons or tribunal in similar

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circumstance would have made. The appellants further contended that the Industrial Court had failed to consider and/or take into account relevant matters in arriving at its decision.

[20] Having heard the oral submissions of the respective parties on 21 October 2010, the High Court then dismissed the appellants' application with costs. In its judgment, the High Court concluded as follows:

> [31] The question at the end of the day is whether a reasonable tribunal similarly circumstanced would have come to a like decision on the facts before it (*William Jacks & Co (M) Sdn Bhd v S Balasingam* [1997] 3 CLJ 235 (CA)). Having perused and considered the documents produced, the submissions and the award I find no error of law committed by the Industrial Court. The decision of the Industrial Court is not tainted with the infirmities of illegality, irrationality or procedural irregularity to merit curial intervention. For the above stated reasons the application is dismissed. Costs of RM500 to be paid by each the applicant to the second respondent.

[21] As regards the punishment of dismissal the High Court had this to say:

> [30] In the award the Industrial Court did take into consideration the misconduct and the fact that the second respondent is in the banking industry. The Industrial Court is of the view that the punishment of dismissal is appropriate. I am of the view that there is no error committed by the Industrial Court. The 'fairness or unfairness of the dismissal is to be judged ... by the objective standard of the way in which a reasonable employer in those circumstances, in that line of business, would have behaved' (Philips J in *NC Watlinq & Co Ltd*). Bearing in mind the 'range of possible reasonable responses' and that the employer is 'the best person to judge the seriousness of misconduct of an employee' the court ought not to substitute its own view on the punishment as different employers react differently to an employee's misconduct.

THE COURT OF APPEAL

[22] The appellants subsequently appealed to the Court of Appeal against the decision of the High Court. The Court of Appeal unanimously dismissed the appellants' appeal with costs. On the issue of 'victimisation' the Court of Appeal held as follows:

> The appellant's argument relating to victimisation was patently untenable premised as it was on conjecture. It is rather far-fetched to conclude that the appellants were victimised simply because they were active union members and there was breach of natural justice in the conduct of the domestic enquiry instituted to determine the charge against them.

[23] As regards the issue of punishment imposed, whether the dismissal was too harsh and was actuated by discriminative practice, the Court of Appeal opined:

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The final aspect of the appeal was in relation to the contention advanced on behalf of the appellants that the dismissal was too harsh and was actuated by discriminative practice. This was premised on the fact that five other employees of the second respondent were also participants in the illegal picket like the appellants but were either let off unpunished or given light punishments. In rejecting the argument that the punishment was too harsh the learned judge relied on the principle set out in *Said Dharmalingam Abdullah v Malayan Breweries Sdn Bhd* [1997] 1 MLJ 352; [1977] 1 CLJ 646 and in our view rightly so. The Supreme Court had this to say at p 364 (MLJ); at p 660 (CLJ):

> We are prepared to accept, as a tenable proposition that, speaking generally, where misconduct has been proven, different employers might react differently. To quote Acker LJ in *British Levland UK Ltd v Swift* [1981] IRLR 91 at p 93: 'An employer might reasonably take the view, if the circumstances so justified, that his attitude must be a firm and definite one and must involve dismissal in order to deter other employees, from like conduct. Another employer might quite reasonably on compassionate grounds treat the case as special'.

In any event the charge proved against the appellants constituted very grave misconduct involving the core of the second respondent's existence and they must have been aware that dismissal would have been the inevitable punishment. The contention relating to discriminative practice was misconceived because the five other employees treated differently from the appellants were never adjudged guilty of the misconduct which was proven against the appellants.

THE SUBMISSIONS

[24] Learned counsel for the appellants submitted that the courts below had erred in fact and/or in law when they had failed to find that the first respondent had committed grave errors of law in agreeing with the second respondent's finding that the appellants' misconduct warranted the ultimate punishment of dismissal. It was contended that in the light of the first respondent's finding that the misconduct was a minor one the court should have held that the punishment of dismissal was too harsh warranting the court's interference.

[25] It was further submitted that the courts below had failed to take into account the following undisputed facts and that if the courts below had done so, they would have had reached a different conclusion. The undisputed facts are as follows:

(a) the appellants were all long standing employees of the bank with no misconduct or past records of disciplinary problems;

(b) there were approximately 40 people who participated in the picketing but action was only taken against 15 of them; and

(c) whilst the appellants were dismissed, the following was the action taken against the other five:

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(i) Rohana bt Abdul Samad who received suspension and show cause letter for allegedly participating in an unlawful picket on 21 February 2003 was not called to attend a domestic inquiry and reported back to work. In the video footage it can be seen that she carried a balloon into the lobby and banking hall which she released. In this regard, the company justified its actions on the basis that she shown remorse by giving an apology letter. However, even assuming that remorse is a mitigating factor, it is not disputed that there was evidence in the court below and as averred in para 8.2 of the affidavit in reply of the appellants that the union adopted a draft letter through the company to the Malaysia Commercial Bank Association, apologising over the incident. This is further corroborated by the union's letter to the bank dated 21 November 2003 which appears at p 1583 *Rekod Rayuan (Bahagian* C) *Jilid* 13;

(ii) Ahmad bin Kassim was found not guilty despite being one of the group of picketers who successfully forced his way through the common lobby of the premises, wearing the protest badge 'BCB Menipu Pekerja';

(iii) Zamir bin Ahmad was found not guilty despite being one of the group of the picketers who successfully forced his way through the common lobby of the premises, wearing the protest badge 'BCB Menipu Pekerja' and carrying a placard in the lobby area;

(iv) Noor Jam bin Kader Mohiden was found not guilty despite being one of the group of picketers who successfully forced his way through the common lobby of the premises, wearing the protest badge 'BCB Menipu Pekerja' and carrying a balloon in the lobby area of the banking hall; and

(v) Maimunah bt Mat Nor was found guilty as she was one of the group of picketers who successfully forced her way through the common lobby of the premises, wearing the protest badge 'BCB Menipu Pekerja' and carrying a balloon into the lobby area and banking hall. However, the disciplinary committee handed down a punishment of stoppage of increment for two years and did not dismiss her summarily as was done to the ten appellants.

[26] It was therefore contended by the appellants that the punishment of dismissal meted out was too harsh and not proportionate to the alleged misconduct committed and that, the second respondent was guilty of unequal treatment and double standards.

[27] In her submission, learned counsel for the appellants referred to the case

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of *Sunmugam a/l Subramaniam v JG Containers (M) Sdn Bhd & Anor* [1998] MLJU 656; [2000] 6 CLJ 521 where the High Court quashed an Industrial Court's award purely on the basis that the company had been guilty of inconsistency of punishment and that the punishment was being too harsh.

[28] Learned counsel for the appellants also referred to the decision of the Industrial Court in *Chartered Bank v National Union of Bank Employees* [1983] 2 ILR 111 where the Industrial Court held that the dismissal was unfair despite misconduct being proven on the basis that the punishment was too harsh and the bank adopted double standards in meting out punishments.

[29] Another case referred to by learned counsel for the appellants in her submission was the decision of the High Court in *Yahaya Talib v Southern Bank Berhad & Anor* [2009] 1 LNS 1785 where the High Court held that the punishment of dismissal was wholly disproportionate to the offence committed by the employee who was an officer of the bank with 31 years of unblemished service.

[30] For the second respondent it was submitted that on the facts of this case the courts below had in fact addressed the appropriateness of the punishment meted out against the appellants based on their participation in the unlawful picket on 21 October 2003 and noted the industry they were employed in. The second respondent contended that the punishment meted out was proportionate to the misconduct that the appellants were found guilty of. Once unlawful picket had been established, the punishment of dismissal was warranted.

[31] Learned counsel for the second respondent also contended that the conduct of the appellants must be scrutinised from the time the show cause letter was issued to the opportunity to mitigate. The appellants showed no remorse. They were members of a trade union and employees of a premier financial institution whose reputation had been tarnished by their conduct of trespassing into the lobby and banking hall during banking hours on 21 October 2003.

[32] Lastly, it was contended by the second respondent that the banking industry belonged to a special kind of business and services rendered to the public. As such, a high quality of discipline and conduct of the highest order is expected of its staff to win public confidence. In support of that proposition learned counsel for second respondent cited the following Industrial Court cases:

(a) *Perwira Habib Bank (M) Bhd v Tan Teng Seng @ Lim Teng Ho* [1997] 2 ILR 839;

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(b) *Azizan Abd Ghani v Bumiputra-Commerce Bank Berhad* [2012] 3 ILR 436;

(c) *Abdul Wahab Hj Suboh v CIMB Bank Berhad* [2012] 4 ILR 445; and

(d) *HongKong Bank Malaysia Berhad v Jaafar Ahmad Thani* [2007] 4 ILR 601.

THE DECISION

[33] It is trite law that the function of the Industrial Court under s 20 of the Industrial Relations Act 1967 is twofold, first, to determine whether the alleged misconduct has been established, and secondly whether the proven misconduct constitutes just cause or excuse for dismissal. Failure to determine these issues on its merits would be a jurisdictional error which would merit interference by certiorari by the High Court (see *Milan Auto Sdn Bhd v Wong Seh Yen* [1995] 3 MLJ 537).

[34] On the facts of the case we are satisfied that the alleged misconduct by the appellants had been proved. We agree with the observation made by the High Court that the Industrial Court had made findings of facts in respect of each the appellant upon viewing the CCTV recordings. The Industrial Court did not commit any error of law in its findings of facts in respect of the appellants' misconduct.

[35] The main issue in this appeal as highlighted by both counsel in their submission is whether the proven misconduct warranted the punishment of dismissal. This issue is more commonly known as the 'harshness rule' or the 'proportionality rule'. In the instant case both the High Court and the Court of Appeal declined to interfere with the second respondent's decision to terminate the services of the appellants. It is pertinent to mention here that the Court of Appeal made two observations on the punishment imposed upon the appellants. First, the appellants' argument relating to victimisation was patently untenable as it was premised on conjecture and secondly, the charge proved against the appellants constituted a very grave misconduct involving the core of the second respondent's business and the appellants must have been aware that dismissal would have been the inevitable result.

[36] On 8 October 2013 this court, in *Norizan bin Bakar v Panzana Enterprise Sdn Bhd* [2013] 6 MLJ 605; [2013] 9 CLJ 409 ('*Panzana*') held that the Industrial Court had the jurisdiction to decide whether the dismissal of the appellant was without just cause or excuse by using the doctrine of proportionality of punishment and also to decide whether the punishment of dismissal was too harsh in the circumstances when ascertaining the award under s 20(3) of the Industrial Relations Act 1967. The Industrial Court, in

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exercising such functions, could rely on its powers under s 30(5) of the Industrial Relations Act 1967 based on the principle of equity, good conscience and substantial merits of the case. It was further held that the doctrine of proportionality of punishment was inbuilt into the Industrial Relations Act 1967 through Item 5 of the Second Schedule. The Industrial Court could substitute its own view as to what was the appropriate punishment for the employee's misconduct, for the view of the employer concerned.

[37] In *Panzana* the questions of law posed for court's determination were as follows:

(a) whether the Industrial Court has the jurisdiction to decide that the dismissal of the appellant was without just cause or excuse by using the doctrine of proportionality of punishment and/or that the punishment of dismissal was too harsh in the circumstances, when handing down an award under s 20(3) of the Industrial Relations Act 1967.

(b) Further and/or in the alternative whether the Industrial Court in exercising its function as stated in the paragraph above can rely on its powers under s 30(5) of the Industrial Relations Act 1967 specifically based on the principle of equity, good conscience and substantial merits of the case.

[38] The court answered the two questions posed in the affirmative. However, on the facts and circumstances of that case the appeal was dismissed.

[39] As a result of the decision in *Panzana* the answer posed in the instant appeal has also to be in the affirmative. However, that does not dispose of this appeal. We have now to examine whether the decision of the Industrial Court that such misconduct did warrant a dismissal was a reasonable decision in the circumstances of the case.

[40] We shall deal first with the appellants' contention that the second respondent was guilty of unequal treatment and double standards because five of the employees who were charged together with the appellants were not dismissed. On this issue we agree with the observation made by the Court of Appeal that there was no merit in the appellants' contention that the appellants' dismissal was actuated by discriminative practice. From the record, the allegation of the inconsistency of punishment of the five employees who were charged together with the appellants was misconceived. Three of the five employees, namely Zamir bin Ahmad, Noor Jam bin Kader Mohiden and Ahmad bin Kassim were found not guilty of the charge in the domestic inquiry that was conducted against them. Their suspensions from work were therefore uplifted. In respect of Maimunah bt Mat Nor, she was found guilty of the charge. However, taking into consideration her plea of mitigation, the second respondent uplifted her suspension and imposed the punishment of stoppage

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of increment for a period of two years with effect from January 2005. In respect of Rohana bt Abdul Samad, the second respondent, after taking into account her written explanation dated 21 November 2003, uplifted her suspension. She was instead issued with a caution letter dated 4 December 2003. These facts were taken into the consideration by the Industrial Court when it considered the fairness or otherwise of the dismissal of the appellants.

[41] The appellants provided a common defence to the allegation of unlawful picket on 21 October 2003 within the premises. They basically denied the allegations. In the letter dated 21 November 2003 signed by the General Secretary of NUBE, they contended that the picket on 21 October 2003 was in compliance with the proviso to s 40(1) of the Industrial Relations Act 1967. When they were asked to submit their plea of mitigation they responded vide their standard letters dated 19 April 2004. In these letters they said:

> As mitigation, I enclose herewith a letter dated 7 April 2004 from the office of the Prime Minister/Minister of Finance address to the Chairman of the Bank YB Tan Sri Radin Soenarno Al-Haj.
>
> I hope the Bank will consider the contents of the letter in the spirit and the intendment in which that letter was written and all the circumstances of this case.

[42] Unlike Maimunah bt Mat Nor and Rohana bt Abdul Samad, the appellants did not apologise to the second respondent for their action even though they were given the opportunity to do so. They showed no remorse. The conduct of the appellants after the offence was established must be taken into account in deciding whether it was reasonable to dismiss them or not. In *British Leyland (UK) Ltd v Swift* [1981] IRLR 91 at p 93 Lord Denning said:

> But there is a further point. It is whether the Industrial Tribunal took into account all relevant considerations. It seems to me that they failed to take into account the conduct of Mr Swift after the offence was discovered. He did not come forward and say: 'I am sorry; I made a mistake, I ought not to have done it. It will not do anything of the kind again'. He did not even tell the same story he told to the police officer. He put forward a 'cock and bull' story about his having lent his Land Rover to another man: and the other man had got the tax disc: and it was the other man's fault: and so forth. As to that, the Industrial Tribunal were quite outspoken. They said: 'It is flying in the face of probability to suggest that he and Mr Rawlins were giving a truthful and accurate account'. So there it is. Mr Swift did not 'come clean' when he was found out. He put forward a wholly untruthful and accurate account'. That seems to me to be a most relevant consideration for the employers to take into account in deciding whether it was reasonable to dismiss him or not ...

[43] With regard to the appellants' contention that the courts below did not take into consideration the fact that the appellants were all long standing employees of the bank with no past records of disciplinary problems, we agree

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with the appellants that this is one of the matters that ought to be taken into consideration in deciding whether it was reasonable to dismiss them or not. However, there is no fixed rule of law to suggest that it was unreasonable to dismiss employees with unblemished records for a single instance of insolence. It depends on the nature of the misconduct. In this connection Lord Evershed MR opined in *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285 at pp 287–288:

> In the present case, the learned judge, in the course of his judgment, said:
>
> > It is clear and sound law that to justify dismissal for one act of disobedience or misconduct it has to be of a grave and serious nature.
>
> Later he concluded, in the plaintiff's favour, that what she had done, or not done, on June 20, 1958, was not sufficiently grave to justify dismissal. With all respect to the learned judge, I think that his proposition is not justified in the form in which he stated it. I think that it is not right to say that one act of disobedience, to justify dismissal, must be of a grave and serious character. I do, however, think (following the passages which I have already cited) that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and for that reason, therefore, I think that one finds in the passages which I have read that the disobedience must at least have the quality that it is 'wilful': it does (in other words) connote a deliberate flouting of the essential contractual conditions.

[44] In the instant case the appellants participated in an unlawful picket in the lobby and the banking hall of BCB Building. They barged through the side entrance door despite attempts by security personnel to prevent them from doing so. They entered the second respondent's business premises with picket materials. They carried placard and balloons, noisily distracting customers and colleagues. The balloons were released in the banking hall. This was clearly a wilful disobedience on the part of the appellants. Their action brought the bank into disrepute among customers and other employees. The Industrial Court did take into consideration the misconduct and the fact that the second respondent was in the banking industry. In a number of cases, the Industrial Court had held that the banking industry belonged to a special kind of business and services rendered to the public. Therefore a high standard of care and conduct was expected of an employee in the banking industry.

[45] On the facts of the case we agree with the observation made by the Court of Appeal that the charge against the appellants was a very grave misconduct involving the core of the second respondent's business and the appellants must have been aware that dismissal would have been the inevitable punishment.

[46] For the reasons given we answer the question posed in the affirmative. Based on the facts and circumstances of this case the dismissal of the appellants

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by the second respondent was fair and was proportionate to the misconduct committed by them. Their appeal is dismissed with costs.

Appeal dismissed.

Reported by Ashok Kumar